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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY OWENS and CLARENCE OWNES,
Petitioners,

v.

TERRY LYNN HEWELL, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a prosecution without probable cause for a traffic violation is a constitutional tort actionable under 42 U.S.C. 1983 for violation of Fourth Amendment protection only if accompanied by arrest or incarceration.

II. Whether the lower court erred in granting summary judgment to the Respondent on the basis of qualified immunity where the undisputed facts showed the law was clearly established and the Respondent violated the law.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners MARY OWENS and CLARENCE OWENS respectfully petition the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit affirmed the judgment of the United States District Court without opinion. (Appendix A, *infra,* 1a; Appendix C, *infra,* 9a.) The opinion of the District Court was unreported. (Appendix B, *infra,* 3a.) The Court of Appeals subsequently denied Petitioners' request for rehearing. (Appendix D, *infra,* 11a.)

JURISDICTION

The court of appeals entered its judgment on January 7, 1994 (Appendix A, *infra,* 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATUTORY PROVISION INVOLVED

Section 1983 of the Civil Rights Act, 42 U.S.C. 1983, provides in relevant part, that a citizen shall have the right to redress when any rights guaranteed by the Constitution are violated or infringed upon in any way by a State or Federal officer, acting under color of authority.

STATEMENT

Petitioners, a husband and wife, sued Terry Lynn Hewell, Brian George, and the City of Loganville in February of 1993 in the United States District Court in the Northern District of Georgia, Atlanta Division. The suit was brought pursuant to 42 U.S.C. 1983 for alleged violations of Petitioner Mary Owens' rights under the 4th, 5th and 14th Amendments to the United States Constitution and pendant state claims for false arrest and malicious prosecution, and for loss of consortium for Petitioner Clarence E. Owens under pendant state law claims.

Prior to an answer being filed by the Respondents, and prior to any discovery, the Respondents filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The District Court granted the Respondents Motion to Dismiss and held that the giving of the traffic citation did not constitute an arrest, nor did the Petitioner's being subject to arrest or imprisonment constitute an arrest, so therefore there was no 4th Amendment violation.

The District Court additionally held that the Petitioner had no 5th Amendment claim for malicious prosecution because there was no evidence to show an egregious misuse of legal proceeding that deprived the Petitioner of a constitutional right, and there was no evidence suggesting the Respondents had any discriminatory, retaliatory, or unconstitutional motives for giving Petitioner the traffic citation.

The District Court further concluded that the Respondent was entitled to qualified immunity because he acted within his discretionary power in issuing the traffic citation and that a reasonable officer under the circumstances would have believed that giving the Petitioner the traffic citation did not amount to an illegal arrest or malicious prosecution.

The case was appealed and submitted on briefs. On January 7, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the lower court. (Appendix A, *infra,* 1a; Appendix C, *infra,* 9a.) The Petitioner filed a Petition for Rehearing or Suggestion of Rehearing En Banc which was subsequently denied. (Appendix D, *infra,* 11a.)

A. Statement of Case

This case arises out of an automobile accident on October 29, 1991, wherein the Petitioner MARY OWENS pulled out onto the highway to execute a left hand turn and was struck by Respondent TERRY LYNN HEWELL, who was a police officer for the City of Loganville who had activated his blue light and accelerated to go after a person in the opposite lane of traffic who he deemed to have been speeding.

Respondent Georgia State Trooper BRIAN GEORGE was dispatched by his patrol post out of Lawrenceville to investigate the accident. When Respondent GEORGE arrived at the scene, the Petitioner had already been transported to the hospital. Respondent GEORGE investigated the accident scene and then went to the hospital to interview Respondent HEWELL. During the interview, Respondent HEWELL informed Respondent GEORGE that before the accident, Respondent HEWELL was not operating his siren.

Absent any probable cause to arrest the Petitioner, and with full knowledge that no siren was activated on Respondent Officer HEWELL's vehicle at the time of the accident, and the law was clearly established that in order

to have a violation of O.C.G.A. 40-6-74 (cited *infra*), the siren would have to have been activated. Respondent Officer HEWELL, in concert with Respondent Trooper GEORGE, charged the Petitioner with failure to yield the right-of-way to an emergency vehicle in violation of O.C.G.A. 40-6-74. They continued to have the unwarranted charges against the Petitioner prosecuted without any basis of legal justification.

During the time of which Petitioner OWENS was issued the traffic citation and notified of her March 30, 1993 court date, Petitioner was informed that if she did not appear in court on that date, a bench warrant would be issued for her arrest. Her freedom of movement and liberty was restrained in that she was required to appear in court on a day certain or subsequently be incarcerated should she refuse to do so. She was also informed that if she was found guilty of said charges, she was subject to incarceration for up to one year in the county jail and a maximum fine of $1,000.00.

As a direct and proximate cause of Respondents' conduct, Petitioner MARY OWENS experienced mental pain and anguish, and loss of property in that she had to pay for a lawyer to represent her.

The Petitioner was subsequently tried on said charges on March 30, 1992 in the Recorders Court for the County of Gwinnett, in the *State of Georgia v. Mary Owens*, File No. 716061 A. Respondents HEWELL and GEORGE both testified against the Petitioner, stating under oath that at the time of the accident, Respondent HEWELL did not have his siren activated. Petitioner MARY OWENS was acquitted of all charges against her.

At the time of the accident and ensuing citation, the Petitioner was not in violation of O.C.G.A. 40-6-74. This fact was known to the Respondents HEWELL and GEORGE at all times during Petitioner's citation and prosecution.

The question presented here is whether a prosecution without probable cause for a traffic violation is a constitu-

tional tort actionable under 42 U.S.C. Section 1983 for violation of the Fourth Amendment only if accompanied by arrest or incarceration.

B. Proceedings Below

On February 2, 1993 the Petitioners herein filed a civil lawsuit pursuant to 42 U.S.C. Sections 1981 and 1983 for violations of Petitioner OWENS' constitutional rights under the 4th, 5th and 14th Amendments, and pendent state claims for false arrest, malicious prosecution, and Petitioner CLARENCE OWENS' state law claim of loss of consortium.

In the complaint, Count I was a federal cause of action brought by Petitioner MARY OWENS pursuant to 42 U.S.C. Sections 1981 and 1983 for violations of her rights under the 4th, 5th and 14th Amendments to the United States Constitution.

Count II was a state cause of action brought by Petitioner MARY OWENS for false arrest and malicious prosecution.

Count III was a state cause of action brought by Petitioner MARY OWENS for punitive damages.

Count IV was a state cause of action brought by Petitioner MARY OWENS for negligence.

Count V was a state cause of action brought by Petitioner CLARENCE OWENS for loss of consortium.

Prior to the filing of an answer and prior to any discovery, the Respondents filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (F.R.C.P.) for failure to state a claim upon which relief can be granted. The District Court granted Respondents' Motion to Dismiss, and held that the giving of the traffic citation did not constitute an arrest, nor did the Petitioner being subject to arrest or imprisonment constitute an arrest, so therefore there was no Fourth Amendment violation. (Appendix B, *infra*, 3a.)

The District Court additionally held that the Petitioner had no 5th Amendment claim for malicious prosecution because there was no evidence to show an egregious misuse of legal proceeding that deprived the Petitioner of a constitutional right, and there was no evidence suggesting the respondent had any discriminatory, retaliatory, or unconstitutional motives for giving Petitioner the traffic citation. (Appendix B, *infra*, 3a.)

The District Court further concluded that the Respondent was entitled to qualified immunity because he acted within his discretionary power in issuing the traffic citation, and that a reasonable officer under the circumstances would have believed that giving the Petitioner the traffic citation did not amount to an illegal arrest or malicious prosecution. (Appendix B, *infra*, 3a.)

The case was appealed and submitted on briefs. On January 7, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the lower court, without opinion. (Appendix A, *infra*, 1a.) The Petitioner filed a Petition for Rehearing or Suggestion of Rehearing En Banc which was subsequently denied. (Appendix D, *infra*, 11a.) It is from that decision that Petitioner respectfully appeals.

REASONS FOR GRANTING THE PETITION

This is a case of first impression in which this court must address the issue of whether a prosecution without probable cause for a traffic violation is a constitutional tort actionable under 42 U.S.C. 1983 for violation of Fourth Amendment protection only if accompanied by arrest or incarceration.

The United States Supreme Court, in the recent decision of *Kevin Albright, Petitioner v. Roger Oliver, etc., et al.*, 510 U.S. ——, 62 L.W. 4078 (1994), has left open the issue of whether a prosecution without probable cause is a constitutional tort actionable under 42 U.S.C. 1983 for Fourth Amendment protection only if accompanied by arrest or incarceration. The Court, in rendering the *Albright* decision, refused to resolve that issue, electing to defer consideration until such time that a case involving facts and circumstances that inherently give rise to that issue is presented before the court. This case presents this very issue.

The District Court, in the case at bar, ruled that a traffic citation which ultimately subjected Petitioner OWENS to arrest or imprisonment did not constitute an arrest which would invoke the protection of the Fourth Amendment. Petitioners contend, however, that this ruling is erroneous, in that it is inconsistent with previous holdings of the United States Supreme Court. *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Pierson v. Ray*, 386 U.S. 547 (1967); *Henry v. United States*, 361 U.S. 98 (1959); *Brower v. County of Inyo*, 489 U.S. 593 (1989); *United States v. Marion*, 404 U.S. 307 (1971); *Kirby v. Illinois*, 406 U.S. 682, 689, 690 (1972); *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Seiser v. Randall*, 357 U.S. 513 (1958); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980); *Klopfer v. North Carolina*, 386 U.S. 213, 221, 222 (1967); *Gernstein v. Pugh*, 420 U.S.

103, 114 (1975); *Strunk v. United States*, 412 U.S. 434, 439 (1973); *United States v. Ewell*, 383 U.S. 116, 120 (1966); *Paul v. Davis*, 424 U.S. 693 (1975).

The District Court's holding that there was no factual basis for an illegal arrest and malicious prosecution was erroneous in that law was clearly established, and the undisputed facts clearly showed lack of probable cause for her arrest and subsequent prosecution, and therefore the Respondents were not entitled to qualified immunity.

This case presents a timely and rare opportunity to provide guidance to the District Courts in regards to the issue of whether, under the Fourth Amendment, a prosecution without probable cause is actionable under 42 U.S.C. 1983 when it is not accompanied by arrest or incarceration, and to address the erroneous holdings of the District Court, and affirmation by the Court of Appeals, that based on undisputed facts, Respondents were entitled to qualified immunity.

I. THIS IS A CASE OF FIRST IMPRESSION IN WHICH THIS COURT MUST ADDRESS THE ISSUE OF WHETHER A PROSECUTION WITHOUT PROBABLE CAUSE FOR A TRAFFIC VIOLATION IS A CONSTITUTIONAL TORT ACTIONABLE UNDER 42 U.S.C. 1983 FOR VIOLATION OF FOURTH AMENDMENT PROTECTION ONLY IF ACCOMPANIED BY ARREST OR INCARCERATION.

The United States Court of Appeals erroneously affirmed, without opinion, the District Court's granting of Respondent's Rule 12(b)(6) Motion to Dismiss. The District Court held that Petitioner's arrest for a traffic violation, which ultimately subjected her to arrest and imprisonment, did not constitute an unlawful seizure in violation of the Fourth Amendment when it was given without probable cause or other substantial justification. This holding is inconsistent with many decisions previously rendered by this Court and other district court decisions. (*See Florida, et al., supra.*)

This Court, the lower district courts and the State Courts of Georgia have consistently ruled that an action for false arrest and/or wrongful detention (false imprisonment) may be brought under 42 U.S.C. Section 1983 for violation of the right to be free from unreasonable search and seizure under the Fourth Amendment, and the right to due process under the Fourteenth Amendment. See *Pierson, supra.* For a warrantless arrest, or any other seizure to be reasonable under the Fourth Amendment, the officer must have probable cause. *Id.* Probable cause to arrest exists where the facts and circumstances within the officer's knowledge, of which he has reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. See *Henry, supra*; *Draper v. United States*, 358 U.S. 307, 313 (1959); *United States v. Burgos*, 720 F.2d 1520, 1524 (1983) (citing *Brinegar* at 175, 176); *Beck v. Ohio*, 379 U.S. 89, 91 (1964); See also *Durden v. State*, 250 Ga. 325, 297 S.E.2d 237 (1982); holding that the State and Federal rules on this issue are the same.

It is only when the nature and extent of a detention are so minimally intrusive of a person's Fourth Amendment interests, that the government can support a seizure based on less than probable cause. *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991) (citing *United States v. Place*, 462 U.S. 696, 703 (1983)).

This Court has held that a Fourth Amendment 'seizure' occurs when there is a governmental termination of freedom of movement through any means intentionally applied. See *Brower, supra.*

In *United States v. Marion*, the Court equated prosecution with arrest in stating "whether [the arrestee] is free on bail or not, the Government must assert probable cause to believe the arrestee has committed a crime." *Marion*, at 320. See also *United States v. Lovasco*, 431 U.S. 791, 792 (1977) (explaining why it would be un-

acceptable to require prosecutors to institute "immediate prosecution upon probable cause," that is, "as soon as they are entitled to do so"); *Hoffa v. United States*, 385 U.S. 293 (1966).

The most severe exercise of power by a government over its citizens lies in the initiation and pursuit of a criminal prosecution:

> The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. . . . It is then that a defendant finds himself faced with the prosecutorial forces of organized society. . . .

Kirby v. Illinois, at 689, 690. The initiation of criminal process places the state's interests in "enforcing the law in the community's prosecution against the interests of transcending value . . . a criminal defendant has in his own liberty." *Brinegar v. United States*, at 176; *Speiser v. Randall*, 357 U.S. 513 (1958). The commencement of a prosecution itself results in a significant burden on a defendant, even if he is ultimately vindicated in the adjudication. *Marshall v. Jerrico, Inc.*, at 249. "Arrest is a public act that may seriously interfere with a defendant's liberty (whether or not he is free on bail) and also disrupt his employment, drain his financial resources, curtail his association, subject him to public ridicule, and create anxiety in him, his family and his friends." *United States v. Marion*, at 320. A criminal prosecution inherently limits the liberty of the accused: "The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, association and participation in unpopular causes." *Klopfer v. North Carolina*, at 221, 222. "Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty." *Gernstein v. Pugh*, at 114. "Anxiety and concern" inevitably accompany public accusation from uncertainties in the prospect of facing public trial. *Strunk v. United States*, at 439; *United States v. Ewell*, at 120.

In the case at bar, Respondents, in their Motion to Dismiss contended that a mere issuance of a traffic ticket did not constitute a seizure and therefore there can be no Fourth Amendment violation.

In support of this position, Respondents relied on the case of *Vasque v. City of Hamtramck*, 757 F.2d 771, 773 (6th Cir. 1985) in arguing that a traffic citation, even if knowingly false and maliciously issued, cannot support a claim for unlawful arrest or malicious prosecution where there was no custodial arrest or threat of imprisonment. However, Respondents, the District Court and the United States Court of Appeals for the 11th Circuit, overlooked Georgia law and United States Supreme Court decisions when using this case as a supporting authority.

Under Georgia law, violation of the Uniform Rules of the Road as set forth in O.C.G.A. 40-6-1 et seq. is punishable as a criminal misdemeanor.

O.C.G.A. 40-6-1 states:

> It is unlawful and, unless otherwise declared in this chapter with respect to particular offenses, it is a *misdemeanor* for any person to do any act forbidden or fail to perform any act required in this chapter.

O.C.G.A. 40-6-74 states:

> (a) Upon the immediate approach of an authorized emergency vehicle or a vehicle belonging to a federal, state, or local *law enforcement agency making use of an audible signal and visual signals meeting the requirement of Code Section 40-6-6*, the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle or law enforcement vehi-

> cle has passed, except when otherwise directed by a police officer.
>
> (b) This Code section shall not operate to relieve the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highways.

O.C.G.A. 17-10-3 states:

> (a) Except as otherwise provided by law, every crime declared to be a misdemeanor shall be punished either:
>
> (1) By a *fine* not to exceed $1,000.00 or by *confinement* in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates, for a total term not to exceed 12 months, or both; or
>
> (2) By confinement under the jurisdiction of the Board of Corrections in a state or county correctional institution or such other institution as the Department of Corrections may direct, for a determinate term of months which shall be more than six months but shall not exceed a total term of 12 months. . . .

In the *Vasque* case, cited by the Respondents, the court was very specific in their opinion that they were holding that there was no cause of action under 42 U.S.C. 1983 because, based on Michigan law, a person convicted of a parking violation was only punished by a fine, and not subject to incarceration. *Vasque*, at 773. Because the sentence in that case did not involve the threat of jail, Plaintiff had not undergone a "seizure" protected by the Fourth Amendment.

The case at bar is distinguishable from *Vasque* in that here, Petitioner was subject to incarceration, and therefore did undergo a "seizure." Petitioner was cited for violation of O.C.G.A. 40-6-74, which as an element of the Uniform Rules of the Road set forth in Title 40, authorizes incarceration for a period of one year and fines

up to $1,000.00. Once Petitioner was cited for this offense, she was subject to incarceration. Consequently, her freedom of movement and liberty interests were curtailed in several ways: she was required to appear in court for criminal prosecution on a specific date; she was subjected to public ridicule for an offense Respondents knew she did not commit; she had to expend her resources to retain legal counsel to defend the unwarranted charges; she underwent anxiety and mental distress and concern for both herself and her family. In all, the acts of Respondents were sufficient to constitute "seizure" within the meaning of the Fourth Amendment, thereby entitling Petitioner to the constitutional safeguards, namely, proof of probable cause to support the seizure.

In regards to the issue of probable cause, Petitioners alleged in Paragraph 7 of their complaint, that Respondents actions were:

> Absent any probable cause to arrest the plaintiff, and with full knowledge that no siren was activated on defendant officer T.L. Hewell's vehicle at the time of the accident and the law was clearly established that in order to have a violation of O.C.G.A. 40-6-74 the siren would have to have been activated, defendant Officer T.L. Hewell in concert with defendant Trooper Brian George, charged the plaintiff with failure to yield right-of-way to an emergency in vehicle in violation of O.C.G.A. 40-6-74. They continued to have the unwarranted charges against the plaintiff prosecuted with any legal justification.
>
> The plaintiff was subsequently tried on said charges on March 30, 1992 in the Recorders Court for the County of Gwinnett, *State of Georgia vs. Mary Owens,* File No. 716061 A and found not guilty.
>
> As the direct and proximate result of the unlawful arrest, and unlawful prosecution, the Plaintiff incurred attorneys fees, costs to make bond, suffered and continues to suffer extreme mental pain and anguish, and was subject to public ridicule by being

> unlawfully charged with a criminal misdemeanor violation and made to stand trial.

The Plaintiff's further alleged in paragraph 8:

> At the time of the accident and subsequent arrest the plaintiff was not in violation of any laws and this fact was known to the defendants.

The respondents in their Brief in Support of Motion to Dismiss, admitted that at the time they issued the citation to Mary Owens, both respondent Terry Lynn Hewell and respondent Brian George, knew Hewell did not have his siren activated and that this was a necessary element in order to prosecute someone for violation of O.C.G.A. 40-6-74. These admissions clearly showed a lack of probable cause and inference of malice.

Because the traffic citation issued to the Petitioner was for a criminal misdemeanor which subjected the Petitioner to incarceration and subjected her to drain on her financial resources, public ridicule, mental pain and anguish, and a public trial, and because the evidence was undisputed that the Respondents had no probable cause to issue the citation, the Petitioners' rights under the Fourth Amendment to the United States Constitution were violated and actionable under 42 U.S.C. 1983. The District Court Order and the United States Court of Appeals affirmance must be reversed.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS BECAUSE THE UNDISPUTED EVIDENCE SHOWED THE LAW WAS CLEARLY ESTABLISHED THEREFORE THE RESPONDENT WAS NOT ENTITLED TO QUALIFIED IMMUNITY.

In order to prevail on a motion to dismiss pursuant to Rule 12(b)(6) in case premised on 42 U.S.C. 1983, a defendant must satisfy the trial court that there is no set of facts which will support allegations that officer/officers (1) acted under color of state law, and (2)

deprived plaintiff of right secured by Constitution and laws. *United Mine Workers of America, Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083 (1979).

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Davis v. Scheru*, 468 U.S. 183 (1983); *Mitchell v. Forsythe*, 469 U.S. 929 (1985). On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. The test to apply is not the subjective element of good faith, but focuses instead on the law at the time of the alleged constitution violation. *Harlow, supra*; *Acoff v. Abston*, 762 F.2d 1543, 1549 (11th Cir. 1985). An officer's mistake with respect to the issues of probable cause will be immunized if it (mistake) was objectively reasonable; that is, if a reasonable officer would not have known that the actions were illegal. *Anderson v. Creighton*, 107 S.Ct. 3034 (1987).

In determining whether the law was "clearly established" at the time of the officer's actions, the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. "Clearly established" requires "some, but not precise factual correspondence" between the relevant precedents and the conduct at issue, and demands that officials apply general, well developed legal principles. *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1988); *Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988).

Government officers and officials have a duty not only to know the law in the area in which they work, e.g. *Glasson v. City of Louisville,* 518 F.2d 899 (6th Cir. 1975), but to take reasonable steps to ascertain whether the actions are lawful, beyond simply relying on their own idea of what the law might be. *Harlow, supra,* at 821 (Brennan, J., concurring); *Salahuddin v. Coughlin,* 781 F.2d 24 (2nd Cir. 1986): see also, *Malley v. Briggs,* 475 U.S. 335 (1986); *McSurely v. McClellan,* 697 F.2d 309 (D.C. Cir. 1982).

Qualified immunity "provides ample support to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed,* 111 S.Ct. 1934, 1994 (1991).

It is the court's responsibility to determine if qualified immunity applies by determining if the actions of the defendants were objectvely reasonable, but in making that determination, the court is obliged to resolve all factual ambiguities in favor of the party opposing the motion. *Ansley v. Heinrich,* 925 F.2d 1339 (11th Cir. 1991) (citing *Goddard v. Urnea,* 847 F.2d 765 (11th Cir. 1988)).

To analyze the qualified immunity defense, the first issue to address is whether the law was clearly established at the time of the incident, and if so, whether the officer's actions were objectively reasonable.

O.C.G.A. 40-6-1 states:

> (a) Upon the immediate approach of an authorized emergency vehicle or a vehicle belonging to a federal, state, or local law enforcement agency *making use of an audible signal and visual signals* meeting with the requirements of Code Section 40-6-6, the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the au-

> thorized emergency vehicle or law enforcement vehicle has passed, except when otherwise directed by a police officer.

O.C.G.A. 40-6-74 states:

> It is unlawful and, unless otherwise declared in this chapter with respect to particular offenses, it is a misdemeanor for any person to do any act forbidden or fail to perform any act required in this Chapter.

State court has jurisdiction over all misdemeaner offenses in county, including violations of this chapter. *Diamond v. State,* 151 Ga. App. 690, 261 S.E.2d 434 (1979).

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

Substantive due process rights are violated no matter what process precedes, accompanies, or follows the unconstitutional action. *Fundiller v. City of Cooper City, supra* (citing *Casines v. Murchek,* 766 F.2d 1494, 1502 (11th Cir. 1985)).

Allegations that the defendants entered into a conspiracy to violate plaintiffs rights states a claim upon which relief could be granted. *United States ex rel. Rodriguez v. Weekly Publications, Inc.,* 68 F.Supp. 767 (1946).

Substantive due process is violated when the government engages in actions which 'offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged wtih the most heinous offenses'. *Rochin v. California,* 342 U.S. 165 (1952). It is that conduct which "shocks the conscience" or constitutes force that is "brutal" and such as "to offend even the hardened sensibilities." *Id.,* at 172, 173.

There are "three categories of police-citizen encounters which invoke the Fourth amendment: police-citizen communications involving no coercion or detention; brief seizures or investigative detentions; and full-scale arrests." *United States v. Hastamorir,* 881 F.2d 1551, 1556 (11th Cir. 1989). Only the latter two invoke Fourth amendment scrutiny.

"Whenever an officer restrains the freedom of a person to walk away, he has seized the person." *Tennessee v. Garner,* 105 S.Ct. 1694, 1699 (1985). Under that standard, a seizure is not unconstitutional unless "unreasonable". Reasonableness is to be determined by 'balancing the nature and quality of the intrusion on the individual's Fourth Amendment interest against the importance of the governmental interests alleged to justify the intrusion.' *Id.,* at 1699 (quoting *United States v. Place,* at 703.) In conducting the balancing test, the court is to consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979).

As action for false arrest and/or detention (false imprisonment) may be brought under 1983 for violation of the Fourth and Fourteenth Amendments. See *Pierson, supra*; *Motes v. Myers,* 810 F.2d 1055 (11th Cir. 1987).

Law enforcement officers may make warrantless arrests where there are "reasonable grounds to believe" that a crime has been committed and the person arrested has committed the offense. *Henry v. United States, supra.*

In a warrantless arrest, in order to prove a constitutional violation the plaintiff must show that she was arrested without a warrant and without probable cause. *McIntosh v. Arkansas Republican Party,* 816 F.2d 409 (8th Cir. 1987).

An arrest occurs when, in view of all the circumstances surrounding an incident, a reasonable person would have

believed he was not free to leave. *Id.*, (citing *United States v. Hammock,* 860 F.2d 390, 393 (11th Cir. 1988)). As the *Hastamorir* Court explained,

> Circumstances which indicate an arrest include: the blocking of an individual's path or the impeding of his progress; the display of weapons; the number of officers present and their demeanor; the length of the detention; and the extent to which the officers physically restrained the individual. This list is not exclusive.

United States v. Hastamorir, at 1556.

For an arrest to have been reasonable, the officer must have probable cause. Probable cause to arrest exists where the facts and circumstances within the officer's knowledge, of which he has reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. *Draper,* at 313; *United States v. Burgos,* at 1524 (citing *Brinegar,* at 175, 176); *Beck v. Ohio,* at 91; See also *Durden, supra,* holding that the State and Federal rules are the same.

Probable cause means reasonable grounds, and is that apparent state of facts which seems to exist after reasonable and proper inquiry. *Bradford v. State,* 149 Ga.App. 839, 256 S.E.2d 84 (1979).

It is only when the nature and extent of a detention are minimally intrusive of the individual's Fourth Amendment interests, can the opposing law enforcement interest support a seizure based on less than probable cause. *Courson v. McMillian, supra* (citing *United States v. Place,* at 703).

The test of probable cause is whether it would justify a person of reasonable caution in believing that an offense has been or is being committed, and this requires probability which is less than a certainty but more than a mere

suspicion or possibility. *Lewis v. State,* 255 Ga. 101, 335 S.E.2d 560 (1985).

The undisputed facts, as alleged in the complaint, and as set forth in the respondents Brief in Support of their Motion to Dismiss, clearly showed that at the time respondent George issued the misdemeanor citation to the petitioner Mary Owens that he had consulted with respondent Hewell and they were both fully aware that at the time of the accident respondent Hewell did not have his siren activated. The law was clearly established that in order to be in violation of O.C.G.A. 40-6-74 the police officer would have had to have both siren and audible flashing lights activated. As police officers they both knew, or should have known, that in order for the petitioner Mary Owens to have been in violation of O.C.G.A. 40-6-74, failing to yield to an emergency vehicle, the emergency vehicle would have had to have both its siren and audible lights flashing. By issuing the unlawful citation to petitioner Mary Owens, when there was clearly no probable cause to issue same, they clearly violated clearly established law and would therefore not be entitled to qualified immunity, and the District Court erred in dismissing the action against Defendant George and the Court of Appeals erred in affirming.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

This Court in *Albright v. Oliver, supra,* addressed at length the issue of whether a person has a cause of action under 42 U.S.C. 1983 for prosecution without probable cause under the substantive due process under the Fourteenth Amendment. The court left open the question of whether a claim under 42 U.S.C. 1983 of the right to be free from prosecution without probable cause can be addressed under the Fourth Amendment. Because this question has not been addressed by the Supreme Court and the lower courts appear to be in substantial disarray on this matter of importance, this case presents a rare

opportunity for this Court to address this issue and to bring much-needed certainty and uniformity to this area. Therefore, the Court should grant the petition.

CONCLUSION

In consideration of the foregoing facts and principles of law, Petitioner respectfully suggests that this High Court declare that this Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

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